Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	
	)	
1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets	)	CC Docket No. 98-183

COMMENTS OF THE CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION

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SUMMARY

The Consumer Electronics Manufacturers Association ("CEMA") supports the Commission's efforts to adapt its regulations, when appropriate, to the realities of changing market conditions. However, while CEMA recognizes that there have been important changes in both the customer premises equipment ("CPE") and common carrier markets, these changes do not, at this time, alter the underlying rationale for the Commission's effective pro-competitive CPE policies and rules with respect to dominant carriers. The success of the current CPE no-bundling rule is underlined by the fact that it was recently used as a "model" in implementing Section 629 of the Telecommunications Act of 1996, in the Commission's *Navigation Devices Order*, CS Docket No. 97-80. Because CEMA is concerned that CPE bundling by dominant carriers would distort the CPE market, reduce competition and consumer choice, and stifle innovation and lower prices, CEMA opposes the Commission's proposal to eliminate the long-standing prohibition against bundling CPE with transmission services by dominant carriers.

If, however, the Commission decides to permit non-dominant carriers to bundle CPE with their transmission services, the Commission must also require these carriers to make a "service-only" option available to subscribers, as it does with cellular carriers. CEMA believes that such a requirement would benefit consumers by ensuring that those consumers that do not purchase carrier-provided CPE may obtain transmission services only. Importantly, if the Commission makes any amendments to its no-bundling rule, it must ensure that any rule change does not distort the clear demarcation between regulated network services and unregulated CPE that currently exists. Physical bundling that blurs the distinction between service and CPE should not be permitted. CEMA therefore opposes any changes to the Part 68 demarcation point rules that would have the effect of blurring the distinction between network equipment and CPE.

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COMMENTS OF THE CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION

The Consumer Electronics Manufacturers Association ("CEMA"), pursuant to Section 1.415 of the Commission's Rules,[1] hereby respectfully submits its comments in response to the Further Notice of Proposed Rulemaking ("*Further Notice*") in the above-captioned proceeding.[2] The Commission issued the *Further Notice* to review its regulatory framework for interstate, domestic, interexchange telecommunications services with regard to the bundling of customer premises equipment (CPE) and enhanced services. In the *Further Notice*, the Commission seeks comment on amending its rules and regulations restricting the bundling of

1 47 C.F.R. § 1.415.

2 *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, etc., CC Docket Nos. 96-61 & 98-183, Further Notice of Proposed Rulemaking, FCC 98-258 (Oct. 9, 1998) ("*Further Notice*").

CPE and enhanced services, respectively, with interexchange services. Additionally, the Commission seeks comment on the impact that amending these rules and regulations may have on the local market and on local exchange carriers, and whether the Commission should amend these rules and regulations for carriers in the local exchange or exchange access markets. [3]

CEMA supports the Commission's efforts to adapt its regulations, when appropriate, to the realities of changing market conditions. CEMA, however, opposes the elimination of the long-standing prohibition of bundling CPE and transmission services by dominant carriers. If the Commission decides to permit bundling of CPE and transmission services by non-dominant carriers, CEMA urges the Commission to require such carriers to make a "service-only" option available to subscribers – a requirement that would benefit consumers by ensuring that those consumers that do not purchase carrier-provided CPE may obtain transmission services only. Furthermore, if the Commission makes any amendments to its no-bundling rule, it must ensure that any rule change does not distort the clear demarcation between regulated network services and unregulated CPE that currently exists. CEMA therefore opposes any changes to the Part 68 demarcation point rules that would have the effect of blurring the distinction between network equipment and CPE.

I. INTRODUCTION AND STATEMENT OF INTEREST

CEMA is the principal U.S. trade association of the consumer electronics industry. CEMA members design, manufacture, distribute and sell a wide variety of consumer electronics equipment, including cordless telephones, personal computers, answering machines,

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[3] The requirement that all common carriers sell or lease CPE separate and apart from such carriers' regulated communications services is codified at Section 64.702(e) of the Commission's Rules. 47 C.F.R. § 64.702(e) (referred to herein as the "no-bundling rule"); *see also Amendment of 64.702 of the Commission's Rules and Regulations*, CC Docket No. 20828, Final Decision, 77 FCC 2d 384 (1980) ("*Computer II Final Decision*").

television receivers, cable set-top boxes, VCRs, camcorders, audio equipment, and in-home network wiring and equipment. As an association of companies that manufacture equipment that can be used with telecommunications services, CEMA has an interest in ensuring that the Commission's rules and policies do not threaten competition in the manufacturing and distribution of consumer devices. Providing competition in the telecommunications marketplace by creating a market for consumers to purchase equipment independent from the provider has led to equipment innovation, lower prices, higher quality, and maximum consumer choice and flexibility. The Commission must ensure that any changes in its rules and policies do not undermine these pro-consumer benefits. Moreover, as discussed below, the convergence of telecommunications and other information media, such as the distribution of multichannel video programming and ancillary services, requires that the Commission adopt a consistent approach to similar situations involving regulated services and deregulated equipment with the goal of preserving and fostering competition in both types of markets.

CEMA believes that the elimination of the no-bundling rule for dominant common carriers is antithetical to the Commission's stated objectives of increasing consumer choice, increasing competition, and eliminating unnecessary regulations.[4] The Commission should not easily forget that the CPE no-bundling rule has been one of its most successful policy initiatives. The rule has allowed consumers to obtain the premises equipment that best meets their needs, whether provided by a carrier or an independent manufacturer. While CEMA recognizes that there have been important changes in both the CPE and common carrier markets, these changes do not alter the underlying rationale for the Commission's current pro-competitive

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[4] *Further Notice* at ¶ 5.

CPE policies and rules that were recently used as a "model" in implementing Section 629 of the Telecommunications Act of 1996.[5]

As the Commission is well aware, Congress passed Section 629 with the express purpose of ensuring a vibrant and competitive market in "navigation devices" (*i.e.*, set top boxes, remote control units, and other equipment). In the Act, Congress directed the Commission to create rules that would allow consumers to obtain navigation devices from commercial sources other than the service provider. In implementing this statute, the Commission stated, in the *Navigation Devices Order*, that its rules and policies requiring the unbundling of navigation devices from the service offerings of multichannel video programming distributors will benefit consumers and further its goal of providing competition by creating an independent market for consumers to own equipment used to access video programming and other services in their homes.[6] The Commission must ensure that any decision regarding its long-standing unbundling policy does not undermine the pro-competitive policy objectives that Congress made clear in the Telecommunications Act of 1996.

II. ENTITIES WITH MARKET POWER SHOULD NOT BE PERMITTED TO BUNDLE REGULATED SERVICES AND UNREGULATED CPE.

CEMA disagrees with the proposal to eliminate the no-bundling rule for entities with market power. The elimination of the rule for dominant carriers would violate numerous congressional and Commission policies designed to protect the public interest. CPE rebundling by dominant carriers would, among other adverse results, reduce competition and consumer choice and stifle innovation, thwart congressional policy favoring CPE unbundling, and create

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5 *See* Communications Act, as amended, § 549, 47 U.S.C. § 629.

6 *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order, FCC 98-116 (June 24, 1998) ("*Navigation Devices Order*)".

serious administrative problems by blurring the boundary between regulated transmissions service and non-regulated CPE. If the Commission decides to permit the bundling of CPE with transmission services by non-dominant carriers, the Commission must also require these carriers to make a "service-only" option available to subscribers – a requirement that would benefit consumers by ensuring that those consumers that do not purchase carrier-provided CPE may obtain only the transmission services they require.

A. CPE Bundling by Dominant Carriers Will Distort the CPE Market, Reduce Competition and Consumer Choice, and Stifle Innovation and Lower Prices.

Historically, the Bell System provided end-to-end service, subject to government regulation. Under this regime, customers were required to purchase both telecommunications transport service and CPE from the carrier – typically for a single price. The Commission ended this regime in 1980, when it adopted the CPE no-bundling rule. The no-bundling rule applies to all common carriers that provide interstate telecommunications service – regardless of whether or not they have market power. The rule was intended to serve two purposes. First, like the antitrust law prohibition of tying, it sought to bar carriers with market power from "forcing" telecommunications customers to purchase carrier-provided equipment. Second, the rule sought to facilitate the entry of independent (*i.e.*, non-carrier-affiliated) manufacturers into the CPE market, on the theory that multiple providers would increase choice, promote innovation, and lower prices.

The Commission must not forget that the no-bundling rule has been one of its most successful policy initiatives. By prohibiting carriers from requiring transmission service customers to use carrier-provided CPE, and barring carriers from using transmission service revenues to cross-subsidize CPE, the no-bundling rule has allowed independent manufacturers to

provide consumers with a wide array of innovative products. As users' communications needs have increased, these manufacturers have developed equipment that creates efficient alternatives to network-based facilities and services. In the 1994 *NYNEX Enterprise Service* proceeding, for example, the Commission observed:

> The CPE industry has exhibited growth and innovation in the fourteen years since the Commission deregulated CPE and required . . . all . . . carriers to detariff CPE and to unbundle it from their network service offerings. . . . The underlying rationale for the Commission's procompetitive CPE policies and rules remains as valid today as it was during the Computer II decisions . . . . The resulting increased competition among manufacturers has driven improvements in equipment quality, lowered CPE prices, and improved the performance of users' data communications networks. These policies have also created new job opportunities in several related sectors of the economy.[7]

Despite the public interest benefits of the no-bundling rule, the Commission has decided to examine whether to allow carriers to bundle CPE with telecommunications services, in light of "changed market conditions."[8] CEMA emphasizes that the no-bundling rule is designed to protect consumers' rights to use the CPE of their choice, not merely to prevent dominant carriers from violating the federal antitrust laws. In CEMA's view, adoption of any rebundling proposal by carriers with market power raises several serious concerns. Further, the fact that the Commission's unbundling rules have succeeded in creating a competitive CPE market is not in itself a sufficient reason to eliminate the rule for dominant carriers.

If the Commission were to adopt the rebundling proposal, dominant carriers would be able to require transmission service customers to use carrier-provided CPE. Such carriers also would be able to use transmission service revenues to offer CPE at cross-subsidized, deeply discounted rates. These practices would threaten the viability of many independent

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[7] *NYNEX Telephone Companies Tariff F.C.C. No.1, Transmittal No. 127,* Memorandum Opinion and Order, 9 FCC Rcd 1608, 1608 (1994).

[8] *See Further Notice* at ¶ 3.

manufacturers. The Commission must not forget that manufacturers have been the primary source of cost-effective, innovative products that are specifically designed to meet the varied needs of end-users, and that such equipment often provides a competitive alternative to network-based services and facilities.

Adoption of the rebundling proposal for dominant carriers also would violate the non-discrimination provision of Section 202 of the Communications Act. Section 202 makes it unlawful for "any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with communications services . . . to any particular person [or] class of persons."[9] This requirement is among the very few provisions of the Communications Act that the Commission may not forbear from enforcing.[10] If the Commission adopts the rebundling proposal, dominant carriers could choose to make transmission service available only to customers that agreed to obtain carrier-provided CPE. This plainly would constitute unlawful "discrimination" in the provision of transmission "service" against a "class of persons" consisting of customers that chose to provide their own CPE. Further, the rebundling proposal would allow dominant carriers to provide transmission service at a lower price to customers that agreed to use carrier-provided CPE. Additionally, dominant carriers would be permitted to provide deep discounts on customer premises equipment to customers that agree to buy the carrier's transmission service. Here, again, the Commission lacks the statutory authority to authorize such conduct as would violate the requirements of Section 202(a).

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[9] 47 U.S.C. § 202(a).

[10] *Compare* 47 U.S.C. § 202(a) *with* 47 U.S.C. § 160(a)(1).

As further explained below, the rebundling proposal also is inconsistent with the Commission's implementation of the navigation devices provisions of the Telecommunications Act of 1996. In implementing Section 629, the Commission not only preserved the no-bundling rule, it extended the existing (and successful) unbundling regime to multichannel video programming systems. Any Commission decision to retreat from its long-standing unbundling policy applicable to dominant carriers would reflect a disturbing disregard for the clear controlling policy choices made by the Congress.

Moreover, the Commission's proposal would subject CPE, for the first time, to the regulatory requirements contained in Title II of the Communications Act. Allowing dominant carriers to bundle CPE with transmission services would cause the Commission to reregulate CPE because such carriers could offer CPE as part of their regulated transmission offerings. Thus, because the Commission would have to ensure that a bundle of CPE and the regulated transmission offerings complies with Title II pricing requirements, the Commission would necessarily need to impose Title II regulation on CPE. This re-merging of the competitive CPE markets with the markets of regulated service offerings would simply undo the Computer II decision, threatening the continued benefits that that decision has made possible. Given the foregoing concerns, the Commission should refrain from permitting dominant carriers to bundle CPE and transmission services.

B. Non-dominant Carriers Should be Required to Make a "Service-Only" Option Available to Subscribers.

In CEMA's view, the no-bundling rule applied to all carriers has achieved remarkable success in fostering competition in the CPE marketplace by deterring anticompetitive practices that would have otherwise taken root. Whatever action the Commission takes in this proceeding, this rule must be preserved, at least insofar as it applies to dominant carriers.

Carriers with market power indisputably have the means and the incentives to undermine competition in adjacent markets. As discussed below, even if the Commission decides to forego application of a no-bundling rule to all but dominant carriers, it must continue to enforce an all-carrier unbundling rule.

The Commission has requested comment on an alternative proposal that would allow common carriers to offer CPE and transmission service packages, provided that they continue to offer transmission service on an unbundled, nondiscriminatory basis.[11] This alternative proposal is identical to the regime adopted in the *Cellular CPE Bundling Order*.[12] Under the rules established in that decision, cellular CPE and cellular service may be bundled, provided that the cellular service is also offered separately. CEMA opposes application of this alternative proposal on dominant carriers, because of concerns raised above. If, however, the Commission decides to permit non-dominant carriers to bundle CPE with their transmission services, the Commission must also require such carriers to make a "service-only" option available to subscribers – a requirement that would benefit consumers by ensuring that those consumers that do not wish to purchase carrier-provided CPE may obtain transmission services only.

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11 *Further Notice* at ¶ 21.

12 *See Bundling of Cellular Customer Premises Equipment and Cellular Service*, Report and Order, 7 FCC Rcd 4028, 4032 (1992) ("*CPE Cellular Bundling Order*").

III. THE COMMISSION MUST RETAIN A CLEAR DEMARCATION BETWEEN REGULATED NETWORK SERVICE AND UNREGULATED CPE.

If the Commission makes any amendments to its no-bundling rule, it must ensure that any rule change does not distort the clear demarcation between regulated network services and unregulated CPE that currently exists. CEMA therefore opposes any changes to the Part 68 demarcation point rules that would have the effect of blurring the distinction between network equipment and CPE.[13]

A. "Physical" Bundling That Blurs the Distinction Between Services and CPE Should Not Be Permitted.

Under the no-bundling rule, a carrier may not require a customer that purchases telecommunications service to purchase carrier-provided CPE. This is often referred to as "physical bundling" or tying. The boundary between regulated basic service and non-regulated CPE offering is critical to the Commission's regulatory regime. For example, the Commission's Part 68 and network disclosure rules apply at the regulation/non-regulated border. Because this boundary is clear and well-established, the Commission's application of these rules has been relatively straightforward. Allowing physical bundling, however, could blur the boundary by allowing carriers to combine basic service and CPE in a single package, which in turn, would make application of existing Part 68 Rules far more difficult.

Moreover, CEMA believes that adoption of the rebundling proposal could substantially complicate administration of the Commission's Part 68 registration program.[14] This program facilitates consumers' ability to provide their own CPE by assuring that such

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13 *See Further Notice* at ¶¶ 19-20 (Commission seeks comment on the whether and how the CPE bundling proposal would affect the Commission's Part 68 Rules).

14 47 C.F.R. § 68.1 *et seq.*

equipment complies with standards designed to prevent technical harm to the network. Under the Commission's rules, only equipment that directly connects to the "network" is subject to registration. If carriers were allowed to include CPE as part of their regulated offerings (much as cable set-top boxes have been included in cable systems' service offerings), then the network boundary would change. Unless Part 68 were modified to encompass "downstream" equipment that connected to this "new" network equipment (*e.g.*, home computers connected to an on-premises yet "network" data service device), equipment that arguably could create network harm would not be subject to registration and would not be registered. Even if the Commission did adapt Part 68 to the new situation, different carriers no doubt would bundle various levels of CPE into their network offerings, creating continuing uncertainty as to which equipment must be subject to Part 68 registration. The end-result would be customer and carrier confusion, along with potentially large increases in CPE registrations and in the resources that the Commission would have to devote to administration of the Part 68 program.

Further, under the Commission's All-Carrier Rule, all facilities-based carriers must disclose relevant network interface information necessary to allow non-carrier-affiliated manufacturers to design CPE that can interoperate with the network.[15] If carriers are permitted to offer CPE as part of their regulated network offerings, however, the network interface – and, hence the disclosure obligation – would shift depending on the CPE functionality that a carrier included within its network offering. This would create numerous disputes as to the extent of the carriers' disclosure obligations. For these reasons, the identity of CPE as distinct from equipment supplied as part of a service offering should not be altered, even if the Commission permits the pricing of CPE and regulated communications services to be bundled.

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[15] *Amendment of Section 64.702 of the Commission's Rules and Regulations* (Second Computer Inquiry), Reconsideration Order, 84 FCC 2d 50, 82-83 (1980).

B. CEMA's Opposition to Bundling is Based on its Experience With the Cable Service and Equipment Markets.

While CEMA recognizes that there have been important changes in both the CPE and common carrier markets, these changes do not alter the underlying rationale for the Commission's effective pro-competitive CPE policies and rules that recently served as a "model" in implementing Section 629 of the Telecommunications Act of 1996.[16] The Commission must ensure that any decision to retreat from its long-standing unbundling policy does not undermine the clear policy objectives that Congress has made. In CEMA's view, permitting unbundling by dominant common carriers is inconsistent with the "pro-competitive, deregulatory framework" put in place by the Telecommunications Act of 1996, which embodies a strong congressional commitment to measures such as CPE unbundling. In implementing Section 629 of the Act, the Commission expressly referred to the success of its pro-competitive CPE policies in deciding to extend the unbundling regime to multichannel video programming systems,[17] such as cable systems.[18] Pursuant to Section 629, the Commission adopted rules that implement the will of Congress to prevent multichannel video programming operators from requiring a customer to

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[16] 47 U.S.C. § 629.

[17] *Navigation Devices Order*, FCC 98-116, at ¶ 11 & n.7.

[18] The Commission's navigation devices rules wisely provide an exception for DBS service providers. The Commission has stated, and CEMA agrees:

> . . . DBS service providers are relatively new entrants in the MVPD service marketplace, particularly when compared to incumbent cable operators. . . . With DBS equipment available in retail stores, and with DBS possessing substantial incentive to pursue additional market share through additional services and improved equipment, we do not think that requiring DBS service providers to separate security elements will serve the goal of enhanced competition in either the service or equipment markets. We note that in many instances, the Commission refrains from imposing regulations on new entrants.

Id. at ¶ 65. The Commission further notes, at ¶ 65 n.156, that: "DBS operators, for example, are not covered by a variety of other statutory requirements and rule provisions. *See, e.g.*, 47 U.S.C. § 532 (Leased Access); 47 U.S.C. § 534 (Must Carry); 47 U.S.C. § 543 (Rate Regulation). As in the case here, the divergences reflect the new entrant nature of the DBS industry as well as differences in the technology and market structures involved."

purchase or lease equipment as a condition of receiving service.[19] The competitive market for consumer equipment in the telephone context provides the model of the market the Commission seeks to foster in the Navigation Devices proceeding.

The Commission should note that, in determining when the navigation devices rules should expire, Congress rejected a proposal that would have linked elimination of the no-bundling requirement solely to the advent of competition in the relevant market.[20] Rather, Congress determined that the no-bundling provision should remain in effect until the Commission finds that the relevant service and equipment markets are competitive *and* that elimination of the rule would be in the public interest. Given the public interest concerns raised herein, the Commission should not permit dominant carriers to bundle CPE and transmission services.

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19 47 U.S.C. § 629; *see also* H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 181 (1996) ("[O]ne purpose of this section is to help ensure that consumers are not forced to purchase or lease a specific proprietary converter box, interactive device or other equipment from the cable system or network operator.").

20 *See* H.R. 1555, 104th Cong., 1st Sess § 203 (1995).

IV. CONCLUSION

For the foregoing reasons, the Commission should retain the current pro-competitive CPE no-bundling rule for dominant carriers. If, however, the Commission decides to permit non-dominant carriers to bundle CPE with their transmission services, the Commission must also require such carriers to make a "service-option" available to subscribers. Further, the Commission must ensure that any rule change does not distort the clear demarcation between regulated network services and unregulated CPE that currently exists.

Respectfully submitted,

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